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In the Supreme Court of the United States

OCTOBER TERM, 1965.

HENRY F. BELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner, Henry F. Bell, defendant-appellant in the court below, petitions this Court to issue its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on October 14, 1965, which affirmed the judgment of the United States District Court for the Middle District of Tennessee, Nashville Division, on April 27, 1964, convicting petitioner of a violation of Title 18, sec. 1503, U.S.C., in endeavoring to influence petit jurors in the trial of the case of *United States* v. *James R. Hoffa and Commercial Carriers, Inc.*, and sentencing petitioner to a period of five years in jail and a fine of $5,000.00, the maximum statutory punishment.

OPINION BELOW.

The opinions of the Court of Appeals are as yet unreported, copies of which are printed in Appendix A and B.

JURISDICTION.

The judgment of the Court of Appeals (Appendix D) was entered on October 14, 1965. A timely Petition for Rehearing was denied with a supplemental opinion (Appendix B) on December 15, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Whether petitioner was denied a fair and impartial trial under the Fifth and Sixth Amendments when the trial court refused to postpone the petitioner's trial, one of a group of sensationally publicized cases in a community for a crime particularly abhorrent to the conscience of the community (jury tampering in the same case), where four defendants had been convicted thirty days earlier in Chattanooga, Tennessee, and another defendant just three days earlier in the very same court room in Nashville, Tennessee, with continuous intervening prejudicial publicity.

2. Whether petitioner was denied a fair and impartial trial in a close case of one man's word against another because the trial court applied a double standard in its evidential rulings favoring the government, wherein evidence of seventeen misdemeanor convictions (ranging from 1949 through 1962) of the government's only inculpating witness was excluded expressly on the ground that felonies alone were admissible to impeach, but the very next day the trial court permitted impeachment of the petitioner himself for one eighteen year old misdemeanor conviction.

3. Whether the Court of Appeals was correct in deciding that the operation of a policy racket is not a crime involving moral turpitude contrary to the holding in every case, the statement in every treatise, the conclusion of every legislative committee, and the expression of every authoritative commentator.

4. In a close case of one man's word against another and where the primary issue for the jury was the conflict in testimony between the only inculpating government witness and the petitioner, whether the trial court's exclusion of seventeen misdemeanor convictions of the government witness and then the next day admitting one misdemeanor conviction of the petitioner was harmless error as decided by the Court of Appeals.

5. Whether the indictment of petitioner was invalid by reason of:

(a) the delegation of the Jury Commission's duties of grand jury selection to non-official "suggestors" (consisting primarily of bankers, Postmasters and State Court officials, and not including any wage earner, manual laborer or representative of organized labor) and the Jury Commission's blanket acceptance of the persons supplied by the "suggestors" without any investigation or examination by the Jury Commission to determine whether such persons were qualified or constituted a cross-section of the community;

(b) the trial court's refusal to grant petitioner a hearing to prove improper delegation of the duties of the Jury Commission in selecting the grand jury, and the systematic exclusion of elements of the community from the grand jury venire; and

(c) the failure of the court in *voir dire* examination to inquire whether the members of the Grand

Jury panel were biased against petitioner because of prejudicial publicity against him relating to the impending Grand Jury investigation.

6. Whether the indictment of the petitioner was invalid because:

(a) petitioner, admittedly a prospective target defendant, was subpoenaed as a witness before the Grand Jury which returned this indictment and was questioned about matters for which he was later indicted;

(b) the trial court directed petitioner, as a prospective defendant, to answer questions which he had refused to answer before the Grand Jury; and

(c) the trial court failed to instruct the Grand Jury that no adverse inference was to arise from petitioner's pleading his privilege against self-incrimination under the Fifth Amendment.

7. Whether the petitioner was deprived of a fair trial when the trial court refused petitioner permission to inspect the transcribed testimony before the Grand Jury of the witnesses used by the government on trial.

The foregoing are the questions which petitioner submits are reasons for granting the writ of certiorari. The following questions he reserves for argument in the event the writ is granted without limitation.

8. Taking the evidence most favorable to the Government as true, whether one statement to a person who does not know the jurors that "it was worth a whole lot of money if I could tamper with them to get them to vote for acquittal" is sufficient to constitute a violation of Title 18, sec. 1503, U.S.C.

9. Whether the trial court erred in failing to grant a new trial where one of the petit jurors failed to disclose the fact that her husband had been subpoenaed as a government witness to testify before the Grand Jury.

10. Whether it was prejudicial error for the trial court to permit the government's witness Ford to testify as to a hearsay statement made by the witness Bellamy out of the presence of petitioner.

11. Whether the indictment was invalid in that it did not allege an offense and was so vague as to amount to a violation of the Sixth Amendment and Rule 7(c).

12. Whether the trial court should have granted the petition for change of judge.

STATUTES INVOLVED.

1. Section 1503, Title 18, U.S.C. provides in pertinent part:

> "Whoever corruptly • • • endeavors to influence, intimidate, or impede any • • • petit juror • • • in the discharge of his duty • • • shall be fined not more than $5,000 or imprisoned not more than five years, or both."

2. Rule 52 of the Federal Rules of Criminal Procedure provides in pertinent part:

> "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."

3. Rule 6(e) of the Federal Rules of Criminal Procedure provides in pertinent part:

> "Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminary to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury • • •."

A STATEMENT OF THE CASE.

In the latter part of 1962, the case of *United States* v. *James R. Hoffa and Commercial Carriers, Inc.* (hereafter referred to as the *Test Fleet* case), ended in a mistrial. Following that trial Judge William Miller ordered an investigation into charges of jury tampering in that case, ordered the impaneling of a special Grand Jury to conduct

the investigation, and then recused himself from further consideration of the matter. (D. A. 42a.)[1] Indictments against 11 persons including appellant emanated from this investigation in four separate cases: *United States* v. *Hoffa, et al.; United States* v. *Medlin* (subsequently severed from the *Hoffa* cases); *United States* v. *Bell* (the instant case); and *United States* v. *Cole, et al.* All the foregoing at times herein will at times be referred to as the *Tamper* cases.

The indictment against petitioner was in three counts. Count III charged petitioner with corruptly endeavoring to obstruct and impede justice by offering to make available $30,000.00 to one Nathan Bellamy to induce Bellamy to communicate with, and to cause others to communicate with, two jurors, Gratin Fields and Mrs. Matthew Walker, who were petit jurors in the *Test Fleet* case. Petitioner was convicted and the maximum statutory punishment permissible was imposed by the trial court, imprisonment for 5 years and a fine of $5,000.00.

1. The Pretrial Prejudicial Publicity Accompanying The "Tamper" Cases.

An unprecedented amount of publicity accompanied each development in each of the cases. It became common newspaper parlance to refer to them as the "jury tampering cases" or the "tamper cases," a name incidentally which persists to the present. Petitioner filed a timely motion to transfer the cause from the district or division for trial listing as grounds that there was so great a prejudice against him that he could not obtain a fair and impartial trial. During the course of the special Grand

[1] References to "D. A." are from petitioner's appendix in the Court of Appeals; references to "G. A." are from the Government's appendix.

Jury investigation there were almost daily reports of the activities of the Grand Jury, including a story concerning petitioner's appearance. (D. A. 60a.) Petitioner's motion to transfer was denied by the trial court, citing as authority its decision in the *Hoffa* cases. (D. A. 40a.)

Subsequently the case involving James Hoffa and his co-defendants (now pending on petition for writ of certiorari before this Court) proceeded toward trial. However, in November, 1963, it was announced that one of the attorneys representing Hoffa had attempted to bribe a prospective juror in the coming trial. This fact was given widespread news coverage specifically in the Nashville area. (D. A. 68a.) A hearing was conducted and the attorney was disbarred and subsequently indicted (*United States* v. *Osborn*—the fifth case).

On December 12, 1963, Judge Gray, the trial judge in the instant case who was to have heard the *Hoffa* case, disqualified himself from that case by written memorandum, stating, "This case and some of the related matters now pending or heretofore heard in this Court touch the integrity of the Court's own processes so closely that the duty of the judges to be alert to any possibly disqualifying factors is especially important." He expressly signified petitioner's case as one of the cases "related" to the *Hoffa* case. (D. A. 44a.)

On December 28, 1963, Judge Wilson transferred the *Hoffa* case to Chattanooga because the intense local press coverage prevented him from receiving a fair trial. (D. A. 50a.)

In January, 1964, another disbarment proceeding (Harry Beard Disbarment) involving alleged jury tampering in the *Test Fleet* case was held by Judge Gray wherein evidence was presented. (D. A. 44a.) The Chattanooga trial began in mid-January, 1964, and lasted six and one-half

weeks, to March 4, 1964, ending in the conviction of Hoffa and three co-defendants. They were sentenced on March 12, 1964. But of pertinent significance here is the publicity accompanying the trial of that case in the Nashville newspapers. A chronological account by headline of the newspaper publicity from February 1, 1964, to April 4, 1964, is included in Appendix E of this brief. (Appendix E, 31a-36a). The actual articles appear as an exhibit to petitioner's motion for a continuance. (D. A. 50a).

As was the custom the trial was signified in the headlines as the "Tamper Trial." Virtually without exception, a minute account of the trial appeared each day on the front pages of both the *Tennessean* and *Banner,* the two Nashville dailies. These accounts included not only the evidence adduced in the trial, but argument of counsel out of the presence of the jury, various offers of evidence, numerous hearings on the relevancy of evidence, rebukes by the trial court of defense counsel, etc. Petitioner's case was included in this publicity. (Articles on Feb. 7 and Feb. 22, 1964.) The verdict of the jury of guilty against four of the defendants in those cases on March 4, 1964, was accompanied by an explosion of publicity in these newspapers. The *Test Fleet* trial (the subject of petitioner's indictment and for which he was then awaiting trial) was described as "one of the greatest attacks on the jury system this country has ever known" and the conviction as a "beacon with the warning that no one may try to thwart" the integrity of the jury system with impunity. (March 5—"Tennessean".) Later the trial judge ordered an investigation into possible jury tampering in the Chattanooga case which was also given wide newspaper coverage. Subsequent to the jury verdict, the press provided daily coverage for the post-trial action including the sentencing, new trial, appeal, etc.

Then followed the trial of Lawrence Medlin, whose case had not been transferred to Chattanooga. He had originally been one of the defendants in the *Hoffa* cases. His trial was set for March 30, 1964, before Judge Wilson in Nashville and the case received the usual splash, both preliminary to and during the trial. In the meantime the press was readying the public for petitioner's trial with articles on March 10 that his was the next "tampering" trial and March 22 that the Government was bringing in the "Billie Sol" prosecutor to try appellant. Petitioner sought the only relief possible to him under the circumstances, a motion for continuance, specifically stating the motion was not made for purposes of delay. (D. A. 51a.) The local press translated this into an attempt to "stall" the trial in an article on April 2, 1964.

A verdict of guilty was returned against Medlin on Friday, April 3, 1963, accompanied by front-page headlines. Appellant's motion for continuance was presented for hearing the next day, Saturday, April 4, 1964, and denied that day. Appellant was ordered to and proceeded to trial Monday morning, April 6, 1964. (D. A. 51a.)

The Court of Appeals concluded that the trial judge did not abuse his discretion in denying the motion for continuance. The Court noted:

> "It was for the benefit of Mr. Hoffa that he is charged with endeavoring to influence jurors. Under these circumstances, it is not apparent how he could be disassociated with Mr. Hoffa. At the minute he went on trial, the issue would be whether he was involved in the Hoffa trial of 1962. The defendant's case could not be tried in a vacuum. How long should the trial court have continued the case? One month? Three months? Six months? A year?" (Appendix A, p. 15a)

2-4. The Double Standard of Evidentiary Rulings Favoring The Government.

The sole direct testimony to support the crime charged was by the government witness Nathan Bellamy who purportedly had a twenty-minute conversation with petitioner in a Nashville restaurant sometime "in late October or early November." The Court of Appeals in its decision stated the following as to his reliability: "His reliability as a witness might be subject to question but the government must take its witnesses where it finds them." (Appendix A, 5a).

In any event, during cross-examination of Bellamy, defense counsel attempted for impeachment purposes to question him regarding numerous and recent criminal convictions arising out of his activities as a notorious "numbers" racketeer. Upon objection by the Government, the trial court refused to permit the examination and advised counsel that, for impeachment purposes, it would limit the examination of the witness, or any subsequent witness, to questions concerning convictions for felonies only. (D. A. 79a.)

In an offer of proof out of the hearing of the jury, defense counsel displayed to the Court that Bellamy had been convicted as many as seventeen times in the period ranging from 1949 to as recent as 1962. The convictions included vagrancy, loitering, operating a disorderly house, loitering around a disorderly house, gaming, keeping a gaming house, and violations of the State Lottery Law. (D. A. 79a-82a.) Bellamy admitted he headed a large policy organization and was one of the chief numbers men in Nashville with at least twenty agents. (R. 128.) While none of the seventeen criminal convictions included the terms "policy" or "numbers", they all were charges result-

ing from Bellamy's "numbers" operations. With regard to violations of the State Lottery Law (which includes policy), Bellamy admitted he had been convicted and fined. (D. A. 79a, 81a.)

The Government rested its case the day Bellamy testified, and the very next day, prior to petitioner's taking the stand as a witness, defense counsel reminded the Court of its ruling that cross-examination for impeachment purposes would be limited to questions regarding prior convictions of felonies only. Defense counsel then asked the Court for a ruling that this same rule would apply to the petitioner. (D. A. 103a.) The Court, however, ruled that on cross-examination of the petitioner, the Government would not be limited to convictions of felonies only, but could include misdemeanors involving moral turpitude. The Government then was permitted to question the petitioner concerning his conviction on a plea of guilty of a misdemeanor some 18 years prior. (D. A. 104a.)

At the end of the trial just prior to deliberation, the trial court instructed the jury that the testimony of a witness may be impeached by showing that he has previously been convicted of a crime involving moral turpitude. (G. A 100b.)

The Court of Appeals noted that the trial judge limited Bellamy's cross-examination to convictions for felonies and that the correct rule includes also crimes involving moral turpitude. However, it held that the convictions for gaming, keeping a gaming house, vagrancy and loitering, operating a disorderly house (which it noted expressly referred to operating a numbers game), and loitering around a disorderly house "cannot be considered as involving moral turpitude." As to the alleged convictions for violating the state lottery law, the Court noted one statement of Bellamy that he put up a cash bond and did not

go back. The Court then held this was not a conviction and whether "this applies to all these cases was not made clear by defense counsel." Defense counsel on petition for rehearing pointed out to the Court that immediately after the gratuitous "cash bond" statement of Bellamy, he was asked if he was convicted and he said yes. (D. A. 81a.) The Court also noted in its opinion that Bellamy admitted on cross-examination that he knew his numbers operation was in violation of state law. (Appendix IA, p. 7a-8a).

As to petitioner's 18-year-old conviction, the Court stated it involved moral turpitude and the fact that it occurred twenty years before went to the weight of the testimony not to its competence. (Appendix A, p. 8a)

On petition for rehearing, the Court of Appeals stated that on further consideration no prejudice resulted to petitioner on the limitation of Bellamy's cross-examination, citing the harmless error rule. (Rule 52(a), Federal Rules Criminal Proceedure.) (Appendix B, p. 23a)

5. The Grand Jury Selection.

The Special Grand Jury which indicted petitioner is the same Grand Jury which indicted James Hoffa and his co-defendants. Petitioner moved to dismiss the indictment, charging that it was illegally and improperly impaneled. By the time the motion was heard, the trial court had disposed of the same motion in the *Hoffa* cases which had alleged the same grounds supported by substantially the same affidavits. In order to save the time of the court and counsel, an agreement was made adopting the same papers presented in the *Hoffa* cases, and the court denied the motion to dismiss. (D. A. 171a-178a.) In the Court of Appeals, petitioner made a similar motion and was granted leave to adopt portions of the brief and appendix references in *United States* v. *Hoffa, et al.*, Nos.

15,876-79. This again was for the convenience of court and counsel since the same issue based on identical facts was being passed on prior to the decision in the instant case. The Court of Appeals in the instant case followed its decision in the *Hoffa* cases and held the Grand Jury was properly selected and legally impanelled. (Appendix A. p. 19a)

Petitioner in this Court has moved to adopt those portions of the Petition for Writ of Certiorari and appendix references thereto in *James R. Hoffa* v. *United States of America,* which relate to the illegal and improper impanelling of the Grand Jury. For the convenience of the Court, petitioner has included the statement of the case and the reasons for granting the writ from the Hoffa Petition in Appendix G, pp. 55a-66a.

6. Petitioner's Constitutional Privileges in the Grand Jury Proceedings.

On February 1, 1963, petitioner was subpoenaed as a witness to appear before the grand jury investigating jury-tampering which returned the indictment against him. The record indicates that he appeared that day without counsel and was advised of his right to counsel and his right to refuse to answer any question. (D. A. 27a.) He was not apprised of the fact that he was an object of the investigation then being conducted. He then invoked his privilege under the Fifth Amendment during the first interrogation. He was directed to answer certain questions and when he refused, he was taken by Government attorneys, still without counsel, before Judge Gray to invoke the court's assistance in obtaining answers. The court was given a transcript of some 14 pages of appellant's testimony and informed of some questions appellant had refused to answer.

The questions concerned matters connected with offenses which later made up the three counts of the indictment. He was asked about his presence within Nashville on certain dates; whether he knew Irwin Kahn and William B. Morgan (who testified as Government witnesses at the trial); and certain questions about the Maryland Farms and Nobel's Cafe or the Brentwood Cafe in Brentwood, Tennessee. (Glen Noble, the proprietor of Traveler's Rest Motel and Nobel's Cafe which borders the Maryland Farms, testified as a Government witness at the trial.)

During the hearing before Judge Gray, petitioner obtained counsel for the first time. The transcript of grand jury testimony was reviewed by the court and petitioner was directed to answer certain questions seeking to determine whether he understood other questions where he pleaded the privilege. (D. A. 31a.) He was then questioned further by the grand jury and was subsequently indicted. The Grand Jury was never instructed by the court that no adverse inference was to rise from appellant's pleas of the privilege.

The Court of Appeals held that the mere subpoenaing of petitioner before the grand jury was not a violation of his constitutional rights; that the trial judge merely required him to answer whether he understood certain questions; that he was not prejudiced in any way by being subpoenaed; and that any adverse inference rising from the failure of the judge to instruct the jury on the privilege was untenable because there was sufficient direct evidence to take the case to the jury at trial. (Appendix A, p. 9a)

7. Failure to Permit Examination of Grand Jury Testimony.

The morning of the commencement of the trial petitioner moved for production of statements and reports to

prospective Government witnesses pursuant to the Jencks Act, Title 18 §3500, U.S.C. The trial court granted the motion with the production of statements to follow immediately the direct examination of the witnesses. At the same time he also moved to inspect the transcribed testimony before the Grand Jury of those witnesses used by the Government at the trial. (Rule 6(e), Federal Rules Criminal Procedure.) The court summarily denied the latter motion. (D. A. 54a.)

The Court of Appeals held petitioner was not entitled to the transcript as a matter of right; that he made no showing that the ends of justice required it; that at best he was only entitled to request the trial judge to make an *in camera* inspection and turn over any inconsistencies in the testimony of a witness. (Appendix A, p. 11a).

REASONS FOR GRANTING THE WRIT.

I. Deprivation of a Fair Trial—the trial of defendants seriatim in a sensationally publicized case in the same community with but three days intervening the last conviction and his trial.

Few would contest that the "jury tampering cases" rank among the most publicized and sensational cases ever reported. Even discarding the daily accounts carried nationally, few cases, if any, have received such extensive and intensive publicity for so long a period in a single community—Nashville, Tennessee—than have these cases. This was due not only to the fact that James Hoffa was a principal, but also to continuing episodes in the pretrial stage of the proceedings which fed a hostile press. A review of these episodes reads like a dime novel: the original Test Fleet trial; the statement from Judge Miller that there was jury tampering, his ordering an investigation to be conducted by a Special Grand Jury and then

his recusation; the Grand Jury investigation itself, with recurrent incidents such as petitioner's confrontation with Judge Gray for pleading the privilege; the subsequent indictments; the many hearings on pretrial motions; the "Osborn" incident resulting in the disbarment of Hoffa's attorney (D. A. 68a.); the recusal of Judge Gray in the *Hoffa* cases (D. A. 44a); the transfer of the Hoffa cases to Chattanooga because of prejudicial publicity; the disbarment of another attorney—Harry Beard; the Chattanooga trial for 6½ weeks; the subsequent convictions, post-trial motions, sentencing, investigations and subsequent indictment of one O'Brien for jury tampering in the Chattanooga case; and finally the Medlin trial and conviction just three days before petitioner's trial.

It was when this publicity had reached a crescendo and five other defendants had been convicted for the same crime less than a month earlier that petitioner was forced to trial.

Since the earliest days of this country, it has been a simple principle founded on fundamental justice and fairness not to hurry a criminal proceeding so as to do injustice to a defendant. As the court stated in *Rex* v. *Rapp,* Pa., 1 Dall. 9, 1 L.Ed. 7 (Pa. 1764):

> "In all cases whether criminal or civil, a trial shall not be hurried on, so as to do injustice to the defendant. *Rex* v. *D'Eon,* 3 Burr 1513."

The problem of balancing the right of a defendant to a fair trial and the freedom of the press to comment on matters of public interest has continuously plagued the courts. Petitioner submits that what was just a problem some 20 years ago has, with the scientific advance of communicative media, reached a point where this balance of rights is now a major impediment to the proper admini-

stration of justice in this country. See Note, *Controling Press & Radio Influence on Trials,* 63 Harv. L. Rev. 840 (1950).

No lengthy discussion need be made of this Court's concern of an accused's constitutional rights to a fair trial before an impartial jury in sensationally publicized cases. *Cf.* comments of Frankfurter, *J.*, in *Irvin* v. *Dowd,* 366 U.S. 717, 729-30 (1961); and Jackson, *J.*, in *Shepherd* v. *Florida,* 341 U.S. 50, 52 (1951); *Estes* v. *Texas,* 381 U.S. 532 (1965); *Marshall* v. *United States,* 360 U.S. 310 (1959). See *Delaney* v. *United States,* 199 F. 2d 107, 115 (1st Cir. 1952). See also *Sheppard* v. *Maxwell,* No. 490, October Term, wherein the Court recently granted certiorari. *Cf.* 34 U.S. Law Week 3171.

The Court of Appeals recognized petitioner's dilemma in being swept up in the prejudicial publicity accompanying Hoffa, stating that "it is not apparent how he could be disassociated with Mr. Hoffa" since it was "for the benefit of Mr. Hoffa that he is charged with endeavoring to influence jurors." The Court asked how long the case should have been continued, "One month? Three months? Six months? A year." But petitioner submits this is no answer. The trial court had the affirmative duty to do everything "humanly possible" to insure fair treatment to petitioner. See *Beck* v. *Washington,* 369 U.S. 541, 587 (1962), Douglas, *J.*, dissenting. In any event, everyone would agree that something more than three days was humanly possible. It would not have overly disrupted the trial court's schedule to put off the trial for a reasonable time. The Government understandably was pressing for trial.

The struggle over the minds of jurors cannot be refereed in the *voir dire* as the Court of Appeals suggests. The extensive saturation of the community mind for so

long a period renders the *voir dire* useless in reaching impartiality. Few jurors would recognize a prejudice built slowly on this continuous adverse publicity and fewer still could brush side "preconceived" opinions although they answered honestly in the affirmative in the *voir dire.*

Thus the circle is complete. Although charged with an attempt to pervert the jury system, petitioner prays for the issuance of this Writ to preserve it. The tampering in this case occurred not in the Test Fleet trial, but in petitioner's being forced to trial when the prejudicial publicity had reached its highest peak. Petitioner's motion for continuance of the trial date for a reasonable period of time should have been granted.

2-4. Deprivation of Fair Trial. The trial court's double standard favoring the government on impeachment in a close case denied petitioner a fair trial and was not harmless error.

Everyone admits that the trial judge excluded impeachment evidence against the government's chief witness and permitted the impeachment of petitioner by the application of contradictory rulings. A double standard was applied favoring the government and this fact stands uncontradicted. Petitioner requested not only what the law allows for impeachment, but at the very minimum only what was given to the government.

This case presents to this Court the question whether a defendant is entitled to at least equal treatment in the trial of a sensationally publicized case admittedly close on its facts.

a) Bellamy's misdemeanors involved moral turpitude.

The Court of Appeals recognized the trial court applied an incorrect rule in excluding evidence of the witness Bellamy's misdemeanors. The rule is not limited to felonies

only but includes crimes involving moral turpitude. The Court of Appeals however ruled Bellamy's convictions in operating his numbers racket did not involve moral turpitude.

This ruling is contrary to the earliest decisions in this Court [see *Marvin* v. *Trout,* 199 U.S. 212, 224 (1905) (gambling is a vice to be suppressed in the interest of public morals)], state courts [see *Ex parte Tuttle,* 91 Cal. 589, 27 Pac. 933, 934 (1891)], general treatises [24 Am. Jur., Gaming and Prize Contests, sec. 3, p. 399], and the conclusions of legislative investigative committees, both congressional and state [see Appendix F., pp. 41a-49a].[2] Moreover, under federal law, the mere *mailing* of policy slips subjects a person to the same punishment defendant now faces, 5 years imprisonment. Title 18, sec. 1302, U.S.C. At least half the states single out this crime as a felony; several provide for punishment similar to defendant's punishment; and one (Virginia) stipulates a policy operator can receive 10 years confinement and a fine. See Appendix F, pp. 37a-40a.

Every authoritative commentator, beginning with Attorney General (now Senator) Robert Kennedy, through Adlai Stevenson, Edgar Hoover, Senator Kenneth Keating, etc. insist that policy is not only dishonest, one hundred per cent fraudulent, ridden with bribery, corruption, mob activity, murder, etc., but *to a man they decry the failure of the law enforcement agencies and the courts to accept and realize the intrinsic evil in the crime.* See Appendix F, pp. 49a-54a.

The Court of Appeals is the first court of appellate jurisdiction to petitioner's knowledge to reduce this vicious

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[2] Petitioner has collected authorities on the nature of the crime of gambling too voluminous to be placed in the body of the Petition. He has inserted them in Appendix F attached to the petition and made a part hereof.

crime to the importance of a traffic violation. The decision is not only erroneous but completely ignores the significance of the decision in the fight against organized crime in this country. The decision presents a question of substantial importance to petitioner's constitutional rights and to law enforcement generally.

b) The error cannot be termed harmless.

Apparently recognizing the tenuousness of its original decision on the impeachment issue, the Court of Appeals turned to the "harmless" error rule in its supplemental opinion denying petitioner's petition for rehearing without withdrawing or amending its original decision. (Appendix B, p. 23a).

But resort to this rule is no answer in the instant case. It cannot be disputed that this case was close, conviction resting on the word of one man, Nathan Bellamy. His credibility as against petitioner's was the sole issue in the case. "In all cases, the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt." *Glasser* v. *United States,* 315 U.S. 60, 67 (1942). Especially is this true here where the government's only incriminating witness, Nathan Bellamy, in his admittedly continuous operation of the numbers racket needed the government's sanction to stay in business by having a government gambling stamp.

This Court and other courts have continually resisted the application of Rule 52(a) in similar close cases where the error could only have had a substantial influence on

the outcome. See *Kotteakos* v. *United States,* 328 U.S. 750, 775 (1946); *Krulewitch* v. *United States,* 336 U.S. 440, 444-45 (1949); *Hawkins* v. *United States,* 358 U.S. 74, 79-80 (1958); *San Fratello* v. *United States,* 340 F. 2d 560, 566 (5th Cir. 1965); *Gold* v. *United States,* 26 F. 2d 185, 186 (2d Cir. 1928); *Fliashnick* v. *United States,* 223 F. 736, 739 (2d Cir. 1915).

Even in cases where the government's evidence was substantial, there is grave hesitancy of courts to term error harmless. The court in *Oliver* v. *United States,* 335 F. 2d 724, 728 (D.C. Cir. 1964), refused to do so where the defendants themselves denied the veracity of incriminating statements in a document erroneously admitted into evidence.

But of special significance here is the unswerving rule in prior decisions in this Court in close cases which turn on the credibility of witnesses giving conflicting testimony. *Gordon* v. *United States,* 344 U.S. 414, 420 (1953), holds that exclusion of impeaching evidence against the key government witness could not be harmless. "Except the testimony of this witness be believed, conviction probably could not have been had." The Court further held the "harmless error" rule "cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony." 344 U.S. at 423.

Krulewitch v. *United States,* 336 U.S. 440, 445 (1949), discarded the harmless error rule where "as to all vital phases . . . , the jury was compelled to choose between believing the petitioner or the complaining witness. The record persuades us that the jury's task was difficult at best." See also *Hawkins* v. *United States,* 358 U.S. 74, 80 (1958); *United States* v. *Pennix,* 313 F. 2d 524, 531 (4th Cir. 1963).

Finally, if there were any question of the harmlessness of the error, it ended with the trial court's instruction that the testimony of a witness can be impeached by showing prior condition of a crime involving moral turpitude and that the jury consider the conviction only "in determining the credibility of a witness." The jury heard but one witness with a conviction—petitioner, Bellamy's convictions having been improperly excluded.

Surely the Constitution provides defendants with at least equal treatment in trials.

5. The Grand Jury Selection.

For the convenience of both this Court and counsel, petitioner in this Court has moved to adopt those portions of the Reasons for Granting the Writ from the Petition in *James R. Hoffa* v. *United States* relative to the illegal and improper impanelling of the Grand Jury. These are identical issues arising from identical facts and petitioner was given leave to and did adopt the argument and appendix references thereto in the Court below.

6. Deprivation of Constitutional Rights in the Grand Jury Proceeding.

There can be no question that the Government had marked petitioner for indictment before he was subpoenaed to testify before the Grand Jury. At the hearing he was interrogated about persons who later testified against him at the trial. Kahn and the juror Morgan were the chief Government witnesses on the first two counts in the indictment which subsequently issued (Record 212-237, 258-286). Benedict was subpoenaed by the Government but did not testify. The other Morgan was labeled appellant's "co-conspirator" in the first count. The fact that petitioner was at the Brentwood Cafe or Nobel's Cafe

near the Maryland Farms with a man named Jolley was part of the Government's evidence under Count III for which petitioner was convicted. (R. 239-245). The foregoing demonstrates that the Government had completed its case against appellant, that he was a "de facto" defendant although not yet indicted, and that the Government compelled him to appear before the grand jury, purportedly as a witness, to gain incriminating evidence from his own lips or to turn the jury from him in the event he remained silent.

These facts present important questions of the propriety of the practice of Government attorneys before grand juries and whether a defendant is entitled to the same Constitutional rights and privileges in the grand jury proceedings as he is afforded after the indictment is returned. These questions have not heretofore been decided by this Court.

Lower courts have continuously condemned the practice of subpoenaing prospective defendants as witnesses before the grand jury for interrogation. *United States* v. *Scully*, 225 F. 2d 113, 116 (2d Cir. 1955); *United States* v. *Edgerton*, 80 Fed. 374 (D.C. Mont. 1897). Compelling petitioner to invoke the constitutional privilege could only have prejudiced him in the eyes of the grand jurors. See *Edgerton, J.*, in *Jones* v. *United States*, 342 F. 2d 863, 868 (1964). Parading him before the grand jury without benefit of counsel was a violation of his rights under the Sixth Amendment.

Moreover, the action of the Government in bringing petitioner before the District Court and using the power of the court to compel him to answer questions served to compound the violation. As a prospective defendant he was directed to answer questions by a district judge before the eyes of the grand jurors. At this point anything

resembling his protection under the Fifth Amendment disappeared. *Massiah* v. *United States,* 377 U.S. 201 (1964); *Escobedo* v. *Illinois,* 378 U.S. 478 (1964); and *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), dictate that the defendant be protected from such misuse of Government power.

Finally the trial court after directing petitioner to answer the questions did not instruct the Grand Jury that his refusal to answer and the order of court compelling him to answer, could not be an inference of evidence against him. Whether such an instruction could have repaired the harm already inflicted is extremely doubtful, but it would at least have provided petitioner with some semblance of protection.

Petitioner respectfully submits that this Court, with its supervisory powers, should not sanction this improper action of the Government. Their conduct in the instant cause resembles the infamous *peine forte et dure* described in Blackstone Commentaries *325-327. The Government must pay more than mere lip service to the privilege against self-incrimination or suffer the reversal of a conviction. See *United States* v. *Maloney,* 262 F. 2d 535, 538 (2d Cir. 1959).

The Court of Appeals held, in effect, that petitioner would not have been prejudiced by the government's action because he pleaded the privilege to all questions and those that the court directed him to answer were "whether he understood" the questions propounded. Moreover since there was sufficient evidence to convict, there was sufficient evidence to indict. While petitioner cannot accept the Court's conclusion of an absence of prejudice, see Edgerton, *J.,* in *Jones* v. *United States,* 342 F. 2d 863, 868 (1964), even if he were to assume it, he submits the Court's analysis is fundamentally unsound. The Fifth

Amendment commands the return of an indictment of a grand jury preparatory to a person's being "held to answer", and the Amendment further commands that the grand jury be "legally constituted and unbiased." See *Lawn v. United States*, 355 U.S. 339, 349 (1958). The Court of Appeals cannot relate the evidence adduced at trial, slim as it is, back to the grand jury proceeding to overcome the bias of the grand jury and the improper conduct of government counsel.

The instant facts present a substantial question dictating the application of this Court's supervisory powers in an area where heretofore government counsel have had open season on an accused's constitutional rights in grand jury proceedings.

7. Fair Trial—Inspection of Bellamy's Transcribed Testimony Before the Grand Jury.

It is abundantly clear that the crucial issue in this case was the credibility of the government's witness, Bellamy. His credibility was an obvious issue before the trial as he was specifically named in the indictment. Therefore his prior statements of what had occurred were crucial to the petitioner's defense during the trial of this cause. His timely motion for inspection of witness' grand jury testimony coupled with his motion for "Jencks Act" statements were made the day the trial began. The statements were provided but the grand jury testimony was not.

The Court of Appeals insists that petitioner was not entitled to a transcript "as a matter of right", and only when "as showing was made that the ends of justice required it." It held no such showing was made.

Petitioner suggests that the primary duty of the trial court is to see that justice is done. Since the grand jury is an arm of the judicial branch of government, to require

limited disclosure to aid the accused is simply allowing the court's own records to be utilized in the interest of justice. Therefore, from this point of view, the simple issue is whether the trial court should withhold any of its own records which an accused person believes will be helpful to him. When viewed in this light, the answer obviously is that a federal court should never deny this requested assistance to an accused.

But even assuming the necessity of the "showing of particularized need" the Court of Appeals requires, except by clairvoyance petitioner cannot possibly show the particularized need suggested until he actually sees the minutes.

The Court relied on *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395 (1959). But as the dissent (composed of Justices Brennan, Black, Douglas and the Chief Justice) pointed out, "It is too late in the day to say . . . that the government may insist upon Grand Jury secrecy, even when the possible prejudice to the accused in a criminal case is crystal clear, and none of the reasons justifying secrecy is present." 360 U.S. at 403.

Petitioner submits that while the reasons for the veil of secrecy of the Grand Jury testimony and its proceedings hold while the Grand Jury is in existence, prior to indictment and even prior to discharge of the jury, those reasons weaken at the time the indictment is issued and certainly disappear during the actual trial of the defendant. Protection of the witness is no longer in issue because he testifies at the trial.

This question is ripe for re-evaluation by this Court so that an accused, such as petitioner, is provided with at least equal knowledge of his accuser's prior statements as is possessed by government counsel.

CONCLUSION.

For all of the foregoing reasons, petitioner respectfully submits the petition should be granted.

Respectfully submitted,

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No. 961

In the

Supreme Court of the United States

OCTOBER TERM, 1965.

HENRY F. BELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDICES A - G TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Preparatory Statement.

The following are Appendices A - G made part of petitioner's Petition for Writ of Certiorari.

APPENDIX A

Nos. 15968-16231

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. HENRY F. BELL, *Defendant-Appellant.*	On Appeal from the United States District Court for the Middle District of Tennessee, Nashville Division.

Decided October 14, 1965.

Before: PHILLIPS and EDWARDS, Circuit Judges, and CECIL, Senior Circuit Judge.

CECIL, Senior Circuit Judge. This cause is on appeal from a judgment of conviction in the United States District Court for the Middle District of Tennessee. Henry F. Bell, defendant-appellant, referred to herein as defendant, was found guilty by a jury on the third count of a three-count indictment. Count three[1] charged that he corruptly endeavored to obstruct and impede the ad-

[1] "The Grand Jury further charges: That in or about the months of October and November 1962, in the Middle District of Tennessee, Nashville Division, HENRY F. BELL, the defendant herein, did unlawfully, knowingly, wilfully, and corruptly endeavor to influence, obstruct, and impede the due administration of justice in the trial of *United States* v. *James R. Hoffa and Commercial Car-*